2001

ANNUAL REPORT

OF THE

APPEAL DIVISION

For the period January 1 to December 31, 2001

WORKERS' COMPENSATION BOARD
OF BRITISH COLUMBIA

Submitted by:
John Steeves
Chief Appeal Commissioner
March 1, 2002

TO: THE PANEL OF ADMINISTRATORS

I am pleased to present this eleventh annual report of the Appeal Division, for the year 2001. We have had a productive year.

The Appeal Division issued significantly more decisions in 2001 than in any year since its inception in June 1991. The Appeal Division issued 2,601 decisions in 2001, which represents a 25% increase in the number of decisions compared to 2000 (2,077). The number of decisions issued in 2000 was itself a record for the Division. The average number of decisions issued by the Appeal Division annually from 1992 to 1999 was 1,843.

The largest single source of decisions continues to be appeals in claims matters from Review Board findings (1,609 of the 2,601 decisions). This represents an 18% increase in the number of Appeal Division decisions on such appeals in 2001 compared to 2000. Coincidentally, the Appeal Division received 18% more appeals from Review Board findings in 2001 compared to 2000.

The year 2002 began with the Review Board producing significantly more decisions per month than had earlier been the case (905 merit findings in January 2002 compared to the monthly average of 599 findings throughout 2001 and 485 per month in 2000). The Appeal Division may therefore experience an increase in the number of appeals from Review Board findings in 2002 compared to the record number of such appeals received in 2001.

Employer appeals for relief of claim costs under section 39(1)(e) resulted in the next largest category of decisions issued by the Appeal Division in 2001. From 1993 through to 1999, the annual average number of decisions on such appeals was 100. This average doubled in 2000 when the Appeal Division issued 209 decisions. This number again almost doubled in 2001 when the Appeal Division issued 408 decisions on these appeals.

Relief of claim costs appeals remain (since 1997) the single largest source of appeals initiated to the Appeal Division. The number of these appeals has been decreasing, however, since 1999, with the number of appeals received in 2001 representing a 22% decrease from the number of such appeals filed

in 2000. This decline is expected to continue since the Board's Historical Section 39(1)(e) Project has now ended.

The Appeal Division's inventory of relief of claim costs appeals also dropped significantly in 2001 with 670 such appeals outstanding at year-end, compared to 2,347 at the end of 2000 (a decline of 72%). This decline is directly related to the dedicated efforts and resources employed in late 2000 and early 2001 to a more timely processing of such appeals. The plan for these processing efforts was discussed in last year's annual report. The pattern since 1997 of significant numbers of these appeals (92%) being withdrawn continued through this period.

As the Appeal Division heads into a year when the appeal process is expected to change significantly, the number of outstanding appeals before the Appeal Division is at its lowest since 1997. This relatively low inventory will assist in the orderly transition to a new appeal structure.

A significant accomplishment in 2001 was the revision and consolidation of all Appeal Division practice and procedure decisions, directives and information sheets into one accessible document. The resulting Appeal Division *Decision #33* [17 W.C.R. and on the internet at http://www.worksafebc.com/publications/appeals/wc_reporter/assets/pdf/33.pdf] became effective September 1, 2001 after broad community consultation. We expect parties will find the document useful and will help ensure accessibility to the appeal processes of the Appeal Division.

One new practice contained in *Decision #33* relates to appeals when the employer of record is no longer registered with the Board. In such circumstances, the Appeal Division may invite the relevant industry or employer association to participate in the appeal, provided the association applies and is placed on the Appeal Division's list of such associations. Placement on the list depends, for instance, on the association having systems in place to protect the privacy of information on claims files. Those associations placed on the Appeal Division's list can be found on pages 16 - 17 of this Report.

The Appeal Division continues to examine new approaches to resolving appeals. In this regard we identified a small number of cases suitable for mediation in the prevention penalty and assessments areas which were

successfully brought to resolution. The resolution of complicated matters through mediation takes a substantial amount of time, often more than would be necessary to adjudicate the appeal. Nevertheless, the positive results achieved for the parties and the appeal process encourages continued examination of mediation at the Appeal Division.

Legislative change in 2001 will affect the Appeal Division's jurisdiction in criminal injury compensation matters. When the Crime Victim Assistance Act, S.B.C. 2001, c. 38 is brought into force a new decision review process will be in place that does not involve the Appeal Division. The new legislation provides transitional provisions which will govern how cases then before the Appeal Division will be processed. This is one aspect of significant restructuring expected in 2002 of the overall appeal system in workers' compensation matters. The Appeal Division looks forward to assisting in the orderly transition to the new appeal structures in criminal injury and workers' compensation matters.

Overall, the accomplishments of the Appeal Division in 2001 have been significant. These accomplishments are primarily due to the commitment of the Appeal Division's staff to quality and timely decisions, as well as the active and responsible participation of workers, employers and their representatives in appeals. As a result, the Appeal Division is well positioned to maintain its strong decision-making tradition while anticipating changes to the appeal structure in 2002.

John Steeves
Chief Appeal Commissioner

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1. APPOINTMENTS AND REMUNERATION

There were several changes concerning appeal commissioners in 2001:

(a) New Appointments:

- **Don Sturrock** was sworn in March 20, 2001 as a non-representational appeal commissioner. Don has been with the Board since 1980, first as a Disability Awards Officer (1980-85), then as a Claims Adjudicator/Case Manager (1985-2000). Immediately prior to his appointment as an appeal commissioner, Don was a Case Manager Quality Initiative in which, among other things, he acted as a technical resource to case managers, provided training services, and reviewed/implemented all appellate returns.

- **Glen Bell** was sworn in March 20, 2001 as a non-representational appeal commissioner. Glen is a lawyer who comes to the Appeal Division from an extensive private practice in environmental and administrative law. He also acted as General Counsel/Director of the British Columbia Ombudsman's Office for six years.

- **Steven Adamson** was sworn in April 2, 2001 as an employer-perspective representational appeal commissioner. Steven is a lawyer who acted as a WCB claims specialist with Canada Post Corporation from 1996 until his appointment as an appeal commissioner. Prior to that Steven taught at a law school and articled and practiced with an international law firm in Toronto and Vancouver. On December 1, 2001, Steven became a non-representational appeal commissioner with the Appeal Division.

- **Roy Wong** was sworn in as a worker-perspective representational appeal commissioner on September 12, 2001. Roy is a lawyer called to the bar of British Columbia. Immediately prior to his appointment as an appeal commissioner, Roy was a representative with the Workers' Advisers' Office. Prior to that he had practiced law in Montreal, Vancouver and Richmond. His practice had included civil and criminal litigation, corporate, commercial, probate, estate and administrative law.

- **Mike Carleton** became a non-representational appeal commissioner on June 1, 2001, after having served as a worker-interest perspective representational appeal commissioner since his initial appointment to the Appeal Division on November 16, 1999.

- **Donna Gillis** was sworn in as a non-representational appeal commissioner on September 12, 2001. Donna's background is in nursing as well as law and she has a wide variety of experience in quasi-judicial decision-making. Over the past nine years Donna acted as an arbitrator in cases between the British Columbia Government and the British Columbia Government Employees' Union, and for the past six years she has been an arbitrator and adjudicator under the Canada Labour Code. From 1989 to 2000 Donna was a panel member of the Canadian Human Rights Tribunal hearing complaints under the Canadian Human Rights Act. Donna was also chair of the former provincial Income Assistance Appeal Board. Prior to her adjudicative positions, Donna was the Vice-President, Human Resources for the Toronto East General Hospital and, before that, Director of Personnel and Labour Relations at the North York General Hospital.

- **Janet Patterson** became a non-representational appeal commissioner on December 1, 2001. Janet is a lawyer and has been an associate member of the British Columbia Public Service Appeal Board which considers appeals from appointments in the public service. In this regard she participated in policy development. Prior to that, Janet was involved in private legal practice. She has been an instructor for the British Columbia Council of Administrative Tribunals, as well as the Labour Studies Program at Capilano College.

- **Randy Lane**, non-representational appeal commissioner, was appointed Assistant Chief Appeal Commissioner effective June 1, 2001. At the same time, **Jill Callan** became Deputy Chief Appeal Commissioner when **Paul Petrie** returned to full time appeal adjudication for personal reasons. When **Jill Callan** left the Appeal Division effective November 23, 2001, **Paul Petrie** returned to the position of Deputy Chief Appeal Commissioner.

(b) Departures:

- Non-representational appeal commissioner **Lorna Pawluk** decided to leave the Appeal Division effective February 28, 2001. Lorna became an appeal commissioner with the Appeal Division when the Division was established in June 1991. Lorna made a strong contribution to the Appeal Division over the years.

- **James Tonn,** employer-perspective representational appeal commissioner, retired on March 30, 2001. His perspective and sense of humour added much to the Appeal Division.

- **Grant McRitchie**, a non-representational appeal commissioner who joined the Appeal Division shortly after its inception in 1991, retired on August 29, 2001. During his time with the Appeal Division, Grant not only exercised his quasi-judicial decision-making function, but also acted as the Appeal Division's manager from 1994 until 1998. In both capacities, Grant's strong experience and sensitive judgement were well respected.

- Non-representational appeal commissioner **Laura Bradbury** left the Appeal Division on October 25, 2001 to pursue opportunities abroad. Laura had been a strong contributor during her three years with the Appeal Division.

- Non-representational Appeal Commissioner **Jill Callan** left the Appeal Division effective November 23, 2001 to assume the position of Special Counsel with the Insurance Corporation of British Columbia. During Jill's six years with the Appeal Division she took on broad responsibilities with the Appeal Division including acting as the Appeal Division's first Assistant Chief Appeal Commissioner and then as Deputy Chief Appeal Commissioner.

As of January 1, 2002 the Appeal Division consisted of the Chief Appeal Commissioner, the Deputy Chief Appeal Commissioner, the Assistant Chief Appeal Commissioner and twenty-four appeal commissioners as follows:

	Name	***Term Expires***
(a)	**18 full-time, non-representational appeal commissioners**	
	Steven Adamson	March 31, 2003
	Glen Bell	March 18, 2003
	Michael Carleton	December 31, 2004
	Daphne Dukelow	October 3, 2004
	Donna Gillis	August 31, 2003
	Sonja Hadley	December 31, 2004
	Cassandra Kobayashi	December 31, 2004
	Jane MacFadgen	December 31, 2004
	Susan Marten	January 7, 2003
	Heather McDonald	September 6, 2004
	Herb Morton	December 31, 2004
	Marguerite Mousseau	December 31, 2004
	Michael O'Brien	November 15, 2002
	James Sheppard	January 7, 2003
	Gail Starr	December 31, 2004
	Don Sturrock	March 18, 2003
	David Van Blarcom	December 31, 2004
	Teresa White	December 31, 2004
(b)	**3 part-time, non-representational appeal commissioners**	
	Janet Patterson	March 31, 2002
	Hilrie Reimer	April 14, 2002
	Judith Williamson	June 30, 2002
(c)	**3 full-time, representational appeal commissioners**	
	Worker interest perspective	
	Sarwan Boal	December 31, 2004
	Roy Wong	September 11, 2003
	Employer interest perspective	
	Rob Kyle	December 31, 2004

Appeal Commissioner salaries are $91,514 per annum for non-representational appeal commissioners and $79,240 per annum for representational appeal commissioners.

John Steeves, as Chief Appeal Commissioner, manages the Appeal Division, sits as an appeal commissioner and as a non-voting member of the Board's Panel of Administrators. His annual salary is $146,880.His five-year term as Chief Appeal Commissioner expires on March 6, 2005.

Paul Petrie's annual salary as Deputy Chief Appeal Commissioner is $105,341.

Randy Lane's annual salary as Assistant Chief Appeal Commissioner is $96,249.

The rates for part-time appointments paid on a *per diem* basis are $426 per day for non-representational appeal commissioners.

2. PLANNING, EDUCATIONAL AND OTHER ACTIVITIES OF THE APPEAL DIVISION

(a) Planning

(i) Access to Appeal Division Decisions

As noted in the Appeal Division's 2000 annual report, the Panel of Administrators supported the Appeal Division's proposal to place all Appeal Division decisions from January 1, 2000 on the Board's website at:

http://www.worksafebc.com/appeal_decisions/appealsearch/advancesearch.asp.

Those decisions have been posted to the website which is regularly updated with current Appeal Division decisions.

The Panel of Administrators left for later resolution whether the approximately 15,000 decisions issued by the Appeal Division prior to January 1, 2000 would be posted to the website. When these

decisions were written, they included identifiers of all parties throughout each decision. Posting these decisions to the website would require individual editing for removal of identifiers so as not to compromise the privacy rights of parties to those decisions. The Chief Appeal Commissioner made recommendations to the Panel of Administrators in 2001 on this issue, identifying the following significant advantages and disadvantages of editing and posting the 15,000 decisions to the website:

- Provides a means by which all past Appeal Division decisions could be made capable of public disclosure;
- Involves a significant commitment of time and resources to the editing function;
- May necessitate accepting a degree of risk that personal information of a party to a decision may be inadvertently disclosed to the public.

Against that background, the Panel of Administrators resolved in July 2001 that the Appeal Division will place the following pre-2000 decisions on the Board's website:

- All pre-2000 Section 11 determinations if they have been filed in a British Columbia court;
- All Appeal Division decisions which have been published in the *Workers' Compensation Reporter*;
- Any significant pre-2000 decision which is referenced or cited in any Appeal Division decision after June 1, 2001.
- Any pre-2000 decision which, in the opinion of the Chief Appeal Commissioner, meets any of the following criteria:
  (a) The decision is written in plain language and it will assist parties to understand the principles developed by the Appeal Division in its decisions on issues that regularly arise in the workers' compensation system;
  (b) The decision represents an established position developed over time on issues of law, medicine, science, the interpretation of legislation, regulations and policy;
  (c) The decision represents a significant contribution to the thinking and development on an issue of law, medicine, etc., but which cannot yet be said to be an established position.

The Panel resolution stated the Appeal Division need not otherwise edit and post any pre-2000 Appeal Division decisions to the website.

The Panel resolution also dealt with circumstances where it may be appropriate for the Appeal Division to refrain from posting an Appeal Division decision to the website. The resolution indicated that the Chief Appeal Commissioner will apply the following criteria when determining whether it would be appropriate to refrain from posting a decision:

> The Appeal Division may not place a decision on the Board's internet website when a secondary edit of a decision fails to protect the privacy of a party and/or the secondary edit renders the decision unintelligible. The privacy of parties to Appeal Division decisions must be maintained but it will be balanced with considerations such as the nature and circumstances of the claim or decision, the communities which likely will access the decision, and a request from a party not to place the decision on the website.

(ii) Strategic Planning

The Appeal Division conducted an educational and planning retreat with the appeal commissioners on November 14, 2001 at the Board's offices in Richmond. The retreat's focus was planning for upcoming change in the appeal structure for workers' compensation matters. A presentation was made by Diane Flood, Chair of the Property Assessment Appeal Board, regarding the provincial government's Administrative Justice Project. Ms. Flood is a member of that Project's Advisory Committee, on behalf of the Circle of Chairs, which is an association of chairs of administrative tribunals throughout British Columbia. Ms. Flood reported on developments to date in the provincial government's initiatives related to its Core Review and the Administrative Justice Project.

The appeal commissioners also met on October 24, 2001 with Alan Winter who was appointed by the provincial government, together with Allan Hunt, to perform a Core Review of the operations of the Workers' Compensation Board. Mr. Winter

carries responsibility for recommending changes to, among other things, the appeal structure.

During 2001, the Appeal Division also completed a project initiated in 2000 to assist in the more expeditious processing of employer relief of cost appeals. This project played a significant part in reducing the inventory of such appeals before the Appeal Division by 72%.

(b) Educational Activities

Ongoing education and training is an essential requirement of an effective administrative tribunal and it is a vital component of quality decision-making. In 2001, the Appeal Division continued its internal education program. This program, together with external workshops and conferences, provides appeal commissioners with necessary information specific to the workers' compensation field, and more generally, to emerging issues of administrative law. Outlined below are the Appeal Division's educational activities during 2001.

The Appeal Division's internal education committee (comprised of Marguerite Mousseau (Chair), Sonja Hadley, Jane MacFadgen, Heather McDonald, Gail Starr and Judith Williamson) was involved in organizing the following educational events:

- Issues Associated with Diagnosis and Causation – Presentation by Board medical advisors and sponsored by the Board's inter-organizational education committee, a committee which includes two members from the Appeal Division's internal education committee.

- Use Of Plenary Sessions by Administrative Tribunals – Presentation by Fran Watters, Associate Chair (Adjudication), Labour Relations Board of British Columbia.

- A series of lunch time educational sessions presented by members of the Appeal Division:

    - Relief of Cost Issues – presented by Jim Sheppard

- Compensation for Chronic Pain – presented by Gail Starr
- Exercise of Discretion in Pension Appeals - presented by Paul Petrie

- Meeting of the appeal commissioners with the Chief Appeal Commissioner and three other Appeal Division officers who deal either with post-decision objections or reconsideration applications from parties. The appeal commissioners invited feedback from these officers on general issues of decision-making and decision writing.

- Advanced Decision Writing Workshop – Two day course presented by instructors from the British Columbia Council of Administrative Tribunals (including appeal commissioner Judith Williamson)

- Online training of appeal commissioners for research on the internet, medical resources, and Quicklaw databases.

External education activities included the following:

- Chief Appeal Commissioner **John Steeves** and non-representational appeal commissioners **Glen Bell**, **Daphne Dukelow**, **Donna Gillis**, **Sonja Hadley**, **Jane MacFadgen**, **Susan Marten**, **Paul Petrie**, **Don Sturrock**, representational appeal commissioners **Rob Kyle**, **Roy Wong** and **Sarwan Boal**, together with Assistant to the Chief Appeal Commissioner **Gene Jamieson,** attended the Sixth Annual Conference of the British Columbia Council of Administrative Tribunals on November 4 and 5, 2001 in Richmond, British Columbia. The title of the conference was "*Achieving the Goals of Administrative Justice – Practical Approaches*". Among a number of workshops, the conference was addressed by the Chief Justice of the British Columbia Supreme Court, the Honourable Chief Justice Donald Brenner, and the British Columbia Attorney General, the Honourable Geoff Plant.

- Chief Appeal Commissioner **John Steeves**, Deputy Chief Appeal Commissioner **Paul Petrie** and non-representational appeal commissioners **Teresa White** and **Laura Bradbury** attended an international conference sponsored by the Council of Canadian

Administrative Tribunals on June 17-20, 2001 in Quebec City. The title of the conference was "*In Search of Universal Values in Administrative Justice*". Non-representational appeal commissioner **Judith Williamson** attended to participate in the presentation of a workshop on advanced decision writing.

- Non-representational appeal commissioner **David Van Blarcom** attended a course entitled "Personal Injury Law Conference" presented by the Continuing Legal Education Society of British Columbia on May 4, 2001 in Vancouver.

(c) Other activities of the Appeal Division

Members of the Appeal Division were also involved in the following activities:

- Chief Appeal Commissioner **John Steeves** met with various organizations to provide updates on the Appeal Division and discuss issues in the appeal system including:

    - The Employers' Forum to the WCB
    - Canadian Labour Congress Winter School
    - The Chairs of Medical Review Panels
    - The Workers' Compensation Advocacy Group

  In addition, John was a participant and a speaker at the Council of Canadian Administrative Tribunals' (CCAT) International Conference in Quebec, "*In Search of Universal Values in Administrative Justice*", held in June 2001. He initiated and chaired a panel on management of administrative tribunals. As well, he attended the British Columbia Council of Administrative Tribunals' (BCCAT) 6th Annual Conference *"Achieving the Goals of Administrative Justice: Practical Approaches"*, held in Richmond, B.C. in November 2001. At that conference John was involved in organizing a labour tribunals' roundtable discussion of conference attendees.

  John is a member of the CCAT Board of Directors, the program co-ordinator of the Circle of Chairs, a member of the Policy Development Committee of BCCAT, and the co-ordinator for the national network of workers' compensation appeal tribunals. He is also a member of the

Advisory Committee for Workplace Rights Tribunals with the Administrative Justice Project, Ministry of Attorney General.

- **Daphne Dukelow**, non-representational appeal commissioner, continued as co-ordinator of the British Columbia Council of Administrative Tribunals' (BCCAT) course entitled "Foundations of Administrative Justice". Daphne is also a member BCCAT's Education Committee and, in November 2001, became a member of the BCCAT Board of Directors.

- Non-representational appeal commissioner **Steven Adamson**, became a member and secretary of BCCAT's Education Committee in November, 2001.

- Representational appeal commissioner **Sarwan Boal**, presented a session on "Advanced Workers' Compensation" at the Canadian Labour Congress Winter School at Harrison Hot Springs in February 2001.

- Deputy Chief Appeal Commissioner **Jill Callan** participated in the presentation of a workshop entitled "Quality Assurance" at BCCAT's 6th Annual Conference in November 2001.

- Part-time non-representational appeal commissioner **Judith Williamson** continued to be a member of the Education Committee of BCCAT. In February, with co-instructor Nitya Iyer, she conducted a 3-day instructor training workshop for the delivery of the Advanced Decision Writing Workshop. In March and July, she and Nitya and provided feedback to the new instructors presenting general offerings of the workshop. Judith continued to instruct in the Foundations of Administrative Justice course, participating in offerings at North Island College, New Aiyansh, and the Justice Institute. In June, along with instructors from BC and Ontario, she participated in the delivery of a decision-writing workshop at the annual conference of the Council of Canadian Administrative Tribunals in Quebec City. In November, Judith and Nitya delivered a tailored version of the Advanced Decision Writing Workshop to the Appeal Division.

- **Mike Carleton**, non-representational appeal commissioner, was one of two directors of the National Institute of Disability Management and Research who attended in Geneva, Switzerland in October 2001 to

participate in a tripartite international review of a draft "Code of Practice for Managing Disability in the Workplace". Mike attended as the nominee of the Government of Canada. Mike was elected chair of the eight-day review process in Geneva that involved 27 experts from 20 countries. The Code now proceeds for consideration to the governing council of the International Labour Organization (ILO) for ratification.

- Non-representational appeal commissioner **Laura Bradbury** was involved in presenting an advanced decision writing workshop at the 6th Annual Conference of BCCAT on November 5, 2001 in Richmond, British Columbia.

- **Gene Jamieson**, Assistant to the Chief Appeal Commissioner, continued as a director of the British Columbia Council of Administrative Tribunals in 2001, as well as serving as a member of the BCCAT Education Committee. Gene continues as an instructor for the BCCAT courses entitled "Foundations of Administrative Justice for Post-secondary Educational Decision-makers", as well as the course entitled "Foundations of Administrative Justice for Administrative Tribunal Support Staff". He was also involved in an offering of the "Foundations of Administrative Justice" course in New Aiyansh, B.C. In addition, Gene co-presented a workshop on bias in administrative law at the 6th Annual Conference of BCCAT on November 5, 2001 in Richmond, British Columbia.

3. MANAGEMENT AND ADMINISTRATION

As of January 1, 2002, there were, in addition to the manager, 36 staff working in the Appeal Division. Secretaries Lisa Ross and Melanie Collins, and appeal officer Allison Walker, were on leave from the Appeal Division at this date.

The Appeal Division continues to provide four-month placements for law students from the co-operative program at the University of Victoria. The student provides legal research support to the division.

The Appeal Division staff on January 1, 2002 were as follows:

Manager	Linda Hart
Assistant to the Chief Appeal Commissioner	Gene Jamieson
Legal Researcher	Rachel Maté
Secretaries	Blanche Andrews (temporary to the position) Donna Hanson Heidi Kelly (temporary to the position) Patricia Spannier
Intake Clerks	Leah Nichol Robyn Scott-Smith
File Clerks	Jordy Tidmarsh
Phone Control Clerks	Shinder Dhaliwal Cynthia Huie

Appeal Officers	Morag Brown Ursula Dixon Bonnie Eisworth Sharon Ertner Linda Horvath Janice Macrae Brenda Provost Andrew Roznicki Doreen Russell Valaine Sananin (temporary to the position) Margaret Shea Anne Toews
Junior Appeal Officers (Relief of Costs) (temporary positions)	Aviva Perez Sharon Watt
Appeal Secretaries	Diane Climie Claire Day Mae Elrick Joyce Farley Lorraine McKenzie (temporary to the position) Vikki Murray (temporary to the position) Karen Tosoff (temporary to the position) Ivana Vukov (temporary to the position) Ria Wildeman Geselle Worobetz Jennifer Young (temporary to the position)

4. EXPENDITURES

The total Appeal Division budget for 2001 was $4,507,371. The actual amount of expenditures for 2001 at year-end was $4,110,659. The actual amount of expenditures in 2000 was $3,775,882.

5. PRACTICE AND PROCEDURE

(a) Decisions and Directives

The following three practice and procedure decisions were issued under the authority of the Chief Appeal Commissioner in 2001:

(i) Delegation by the Chief Appeal Commissioner *Decision #32 (1 June 2001)*

Section 85(8) of the Workers Compensation Act authorizes the Chief Appeal Commissioner to delegate in writing any of his powers and duties to an appeal commissioner, subject to any terms or conditions set out in the delegation. *Decision #32* made various delegations to appeal commissioners and appointed Jill Callan as Deputy Chief Appeal Commissioner and Randy Lane as Assistant Chief Appeal Commissioner.

(ii) Appeal Division Practice and Procedure *Decision #33 (29 June 2001)*

This decision represents a consolidation of all Appeal Division practices and procedures for processing the variety of matters within the Appeal Division's jurisdiction. This decision followed broad consultation among the workers' compensation community, including affected departments and divisions within the Board. A draft for public comment was on the Board's internet website and copies were provided for comment to a wide range of stakeholders. A variety of submissions were received as a result and a further draft was developed which was the subject of two meetings with the Board's Policy Development Consultative Committee comprised of the Director of the Employers' and Workers' Advisors offices and a representative from the Employers' Forum and the British Columbia Federation of Labour. In the end a number of practices of the Division were either changed or

eliminated in order to have a set of practices that are responsive to the Division's current work.

This decision, with all relevant practice and procedure information in one accessible location, will assist the community in its interaction with the Appeal Division. The decision is published in volume 17 of the *Workers' Compensation Reporter* and is also accessible on the internet at:

http://www.worksafebc.com/publications/appeals/wc_reporter/assets/pdf/33.pdf

(iii) Delegation by the Chief Appeal Commissioner *Appendix "O" to Decision #33 (21 November 2001)*

This appendix of *Decision #33* was amended effective November 26, 2001 to appoint Paul Petrie as Deputy Chief Appeal Commissioner and continue the appointment of Randy Lane as the Assistant Chief Appeal Commissioner.

(b) Employer Associations

A significant change made to the Appeal Division's practices and procedures in *Decision #33* relates to inviting employer associations to participate in an appeal when the employer of record is no longer registered with the Board. *Decision #33* establishes the requirement that industry associations must apply to be placed on an Appeal Division list of associations to receive notice in claim appeals where the employer is de-registered. *Decision #33* indicates, for instance, that associations must have systems in place to protect the privacy of information on claim files disclosed to them. It also states that the names of approved industry associations will be published in the Appeal Division's Annual Report.

Pursuant to this provision of *Decision #33*, the Chief Appeal Commissioner has approved of the following six associations to receive notice of claims appeals when the employer in those industries is de-registered:

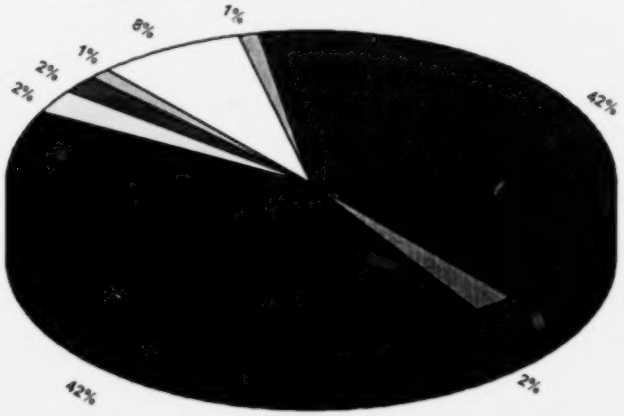
- Health Employers Association of British Columbia
- British Columbia Trucking Association
- British Columbia Maritime Employers' Association
- Council of Construction Associations
- British Columbia Automobile Dealers Association
- Mining Association of British Columbia

6. NEW MATTERS

(a) General

The Appeal Division received 4576 new appeals or other matters during 2001, for an average of 381 per month. This is a decrease from the monthly average of 396 in 2000, 437 in 1999 and 397 in 1998, but is consistent with the monthly average of 376 in 1997, and is a significant increase over the average of 255 per month in 1996, 194 in 1995, and 155 in 1994.

NEW MATTERS IN 2001 BY TYPE



■	Appeals from Review Board findings [s. 91]	1899	42%
■	Prevention [s. 73] (4) Bill 14 (92)	96	2%
■	Employer Relief of Costs [s. 39(1) and ERA]	*1924	42%
□	Assessments (62) Section 47(2) (43)	105	2%
■	Certificates for Court Action [s.11]	100	2%
■	Criminal Injuries	49	1%
□	Extension of Time Requests	358	8%
■	All other matters:	45	1%
	Review Board Referrals [s. 96.4)] (4) Transfer of Claim Costs [s.10(8)] (1) Reconsideration Applications (40) Section 96.1 (39) Section 96(2) (1)		
	TOTAL NEW MATTERS	**4576**	**100%**

* See comments regarding these 1924 appeals immediately after the following tables.

APPEAL DIVISION INTAKE
MONTHLY AVERAGE OF NEW MATTERS RECEIVED
1992 TO 2001

Time Period	*Intake*	*Monthly Average*
1992	1992	166
1993	2296	191
1994	1860	155
1995	2325	194
1996	3056	255
1997	4511	376
1998	4764	397
1999	5249	437
2000	4757	396
2001	4576	381

NEW MATTERS FILED TO THE APPEAL DIVISION BY YEAR

Matter Type	*2001*	*2000*	*1999*	*1998*	*1997*	*1996*	*1995*	*1994*	*1993*	*1992*
Section 91 appeals from Review Board	1899	1610	1630	1745	1590	1482	1475	1200	1429	1206
Section 96(4) President's referrals	4	9	6	4	3	7	7	2	4	1
Prevention – general	4	1	52	102	94	121	120	171	155	179
O.H.S. (Bill 14)	92	72	20	NA/	N/A	N/A	N/A	N/A	N/A	N/A
Section 39(1) employer relief of costs	1924	2470	2967	2355	2286	942	151	131	387	219
Criminal injury matters	49	70	65	84	83	44	32	46	12	6
Section 47(2) employer charged with costs	43	35	34	17	22	42	20	14	16	19
Assessments	62	86	73	53	61	66	201	110	118	85
Ombudsman (reconsideration)	0	0	0	1	0	0	0	1	1	26
Section 10(8) transfer of claim costs	1	5	6	10	1	10	8	11	5	10
Section 11 certificates	100	97	112	85	78	78	55	74	84	86
Reconsideration - Appeal Division decisions	39	67	49	36	50	43	59	93	69	64
Reconsideration - former commissioners' decisions	1	3	1	4	8	2	13	7	15	34
Extension of time to appeal	358	232	234	268	235	219	184	*	*	31
Miscellaneous	0	0	0	0	0	0	0	0	1	26
TOTAL	**4576**	**4757**	**5249**	**4764**	**4511**	**3056**	**2325**	**1860**	**2296**	**1992**

* *Extension of time applications were included in the figures for each matter type in 1993 and 1994*

The Appeal Division received 4% less new matters (181) in 2001 than was received in 2000. This decrease is attributable to the decline in the number of employer relief of claim costs appeals received in 2001 compared to the previous four years. The Board's historical section 39(1)(e) project ended in 2001 which helps explain the decline in such appeals. Despite the decrease in employer appeals for relief of costs under section 39(1)(e), this type of appeal remains the single largest source of appeals to the Appeal Division.

The overall decline in new matters received by the Appeal Division in 2001 is to be contrasted with the 18% increase in the number of appeals received from Review Board findings in 2001 compared to 2000. Indeed, the 1,899 appeals received from Review Board findings in 2001 is the highest number of such appeals received in any year since the Appeal Division's inception in 1991. Appeals from Review Board findings, however, continue to rank slightly behind employer relief of costs appeals in terms of overall volume. These two types of appeals represent 84% of all new matters filed with the Appeal Division in 2001.

The Appeal Division experienced in 2001 an increase in appeals related to occupational health and safety prevention matters, and section 47(2) appeals related to employers charged with costs. There was a small increase in the number of section 11 certificates requested of the Appeal Division in 2001. The Appeal Division received less applications in 2001 compared to the previous year in the areas of criminal injury compensation, assessment appeals, requests for reconsideration of Appeal Division decisions, and President's referrals under section 96(4). There was a significant increase in the number of applications for an extension of time to appeal to the Appeal Division.

Regarding the number of employer relief of claim costs appeals under section 39(1)(e), the number of such appeals has been large since the second half of 1996. During the five years from the inception of the Appeal Division in June 1991 to June 1996, the Appeal Division received 953 appeals under section 39(1)(e). This contrasts with the 12,879 such appeals received during the five and one-half years from July 1, 1996 to the end of 2001.

The dramatic change in the number of such appeals can be traced to the June 11, 1996 resolution of the Panel of Administrators which implemented recommendations of the provincial Information and Privacy Commissioner, effective July 1, 1996. One recommendation was that employers not receive full disclosure of workers' claim files until an appeal has been filed. Prior to the change of policy, employers were provided full disclosure of claim files once an appealable decision was made. With the change of policy, an employer must first initiate an appeal before full disclosure is provided.

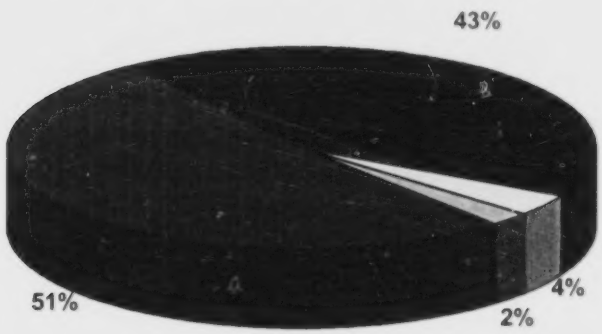
As a consequence, the vast majority of such appeals from 1997 to 2001 were withdrawn before an Appeal Division panel was required to rule on the appeal. Of the 11,813 employer relief of claim costs appeals dealt with by the Appeal Division from 1997 to the end of 2001, appeals totaling 10,848 (92%) were withdrawn prior to an Appeal Division panel having to adjudicate on the appeal. The processing of such appeals by the administrative staff of the Appeal Division represents a significant allocation of resources. While this significant number of withdrawals has held for a number of years, there is some indication from the Appeal Division's experience in the latter half of 2001 that the number of cases proceeding to decision are increasing significantly. In this regard, the Appeal Division dealt with 1,237 employer relief of costs appeals from July 1, 2001 to December 31, 2001. Of those matters, 990 (80%) were withdrawn, while 247 (20%) proceeded to a decision by the Appeal Division panel.

If this trend continues, it is expected the Appeal Division will experience a significant increase in the number of decisions required on employer relief of claim costs appeals under section 39(1)(e).

(b) Requests for an extension of time to appeal

In 2001, 358 applications were received for an extension of the 30 day time limit for appealing to the Appeal Division.

EXTENSION OF TIME REQUESTS BY TYPE



■	Review Board s. 91	184	51%
■	Relief of claim costs	152	43%
□	Employers charged with costs – section 47(2)	13	4%
▨	Assessments	8	2%
■	Prevention penalties	1	0%
	Total	**358**	**100%**

The number of extension of time requests in 2001 represents a 54% increase from the number of such requests received in 2000 (232). The Appeal Division received 234 such requests in 1999, 268 such requests in 1998, 235 in 1997 and 219 in 1996.

(c) Review Board appeals

During 2001 the Appeal Division received 1899 appeals from Review Board findings, a monthly average of approximately 158. This represents an 18% increase from the number of such appeals received by the Appeal Division in 2000 (1610). The 1899 appeals represents the largest number of such appeals received in any year since the inception of the Appeal Division in 1991.

The 1899 appeals from Review Board findings represent 15% of the total number of Review Board decisions (panel findings and summary decisions) in 2001. This is consistent with the range of total Review Board decisions received by the Appeal Division in 2000 (15%), 1999 (15%), 1998 (16%), 1997 (14%) and 1996 (15%). The percentage remained in the range of 17% to 21% from 1993 to 1995.

(d) Employers' appeals or applications

2654 of the new matters initiated to the Appeal Division in 2001 were brought by employers. There was a 33% increase in employer appeals of Review Board findings in 2001 compared to 2000. Overall, however, employers filed 12% less appeals in 2001 compared to 2000. This can largely be attributed to the 22% decrease in relief of costs appeals in 2001 compared to 2000.

Employer appeals or applications in 2001 by type

Type	*Number*
Employer appeals of Review Board findings	330
Prevention appeals	4
O.H.S. (Bill 14)	71
Employer relief of costs appeals	1924
Employer charged with costs - Section 47(2) appeals	43
Assessment appeals	62
Transfer of claim costs Section 10(8) appeals	1
Reconsideration applications	18
Extension of time requests	201
Total	***2654***

Employers' appeals or applications in 2000 totalled 3030 which was comprised of: 249 appeals of Review Board findings; 72 prevention/Bill 14 appeals; 2470 relief of costs appeals; 35 appeals by employers charged with costs; 86 assessment appeals; 5 section 10(8) appeals; 21 reconsideration applications; and 112 extension of time requests.

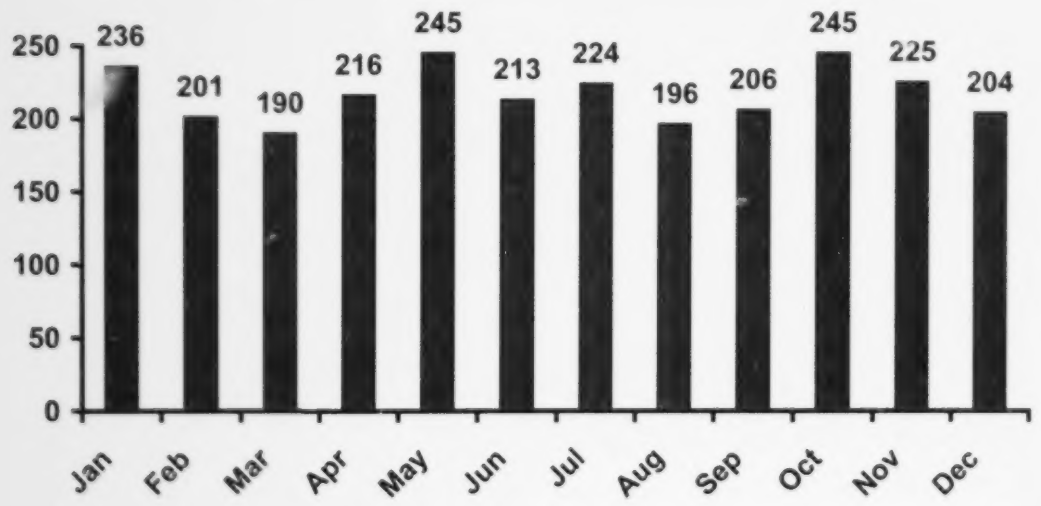
7. DECISIONS OF THE APPEAL DIVISION

(a) General

There were 2601 decisions rendered by the Appeal Division in 2001, an average of 217 per month. This is the most decisions the Appeal Division has issued in a calendar year since the Division's creation in 1991. It represents a 25% increase in the number of decisions issued compared to 2000 (2077).

In addition to the 2601 decisions in 2001, there were 3191 cases which were withdrawn or rejected on a preliminary basis, and 472 cases where the matter was withdrawn to facilitate other action outside the Appeal Division. In total, therefore, there were 6264 cases dealt with during 2001.

DECISIONS OF THE APPEAL DIVISION BY MONTH



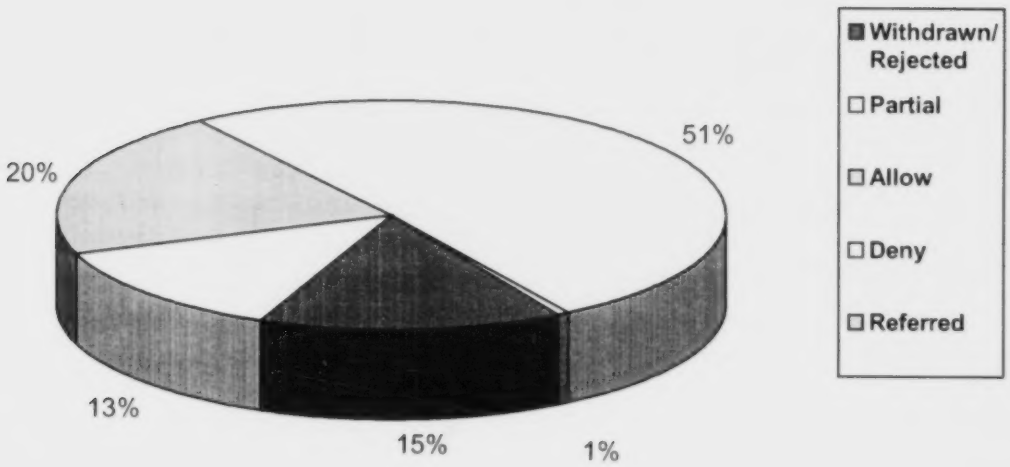
DECISIONS OF THE APPEAL DIVISION BY YEAR

Matter Type	***2001***	***2000***	***1999***	***1998***	***1997***	***1996***	***1995***	***1994***	***1993***	***1992***
Section 91 appeals from Review Board	1609	1361	1374	1433	1192	1320	1053	1067	1304	1247
Section 96(4) President's referrals	4	5	6	1	2	9	4	3	2	2
Prevention – general	1	17	81	69	96	93	106	140	159	301
O.H.S. (Bill 14)	62	30	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Section 39(1) employer relief of costs	408	209	108	107	128	83	87	89	130	212
Criminal injury matters	71	110	97	77	51	40	29	40	14	0
Section 47(2) employer charged with costs	19	23	22	9	23	27	14	11	13	22
Assessments	45	29	34	31	35	164	46	62	72	86
Section 10(8) transfer of claim costs	1	2	10	0	1	2	1	5	1	6
Section 11 certificates	63	48	49	53	41	53	41	39	51	58
Reconsideration - Appeal Division decisions	56	64	38	44	48	44	49	55	29	15
Reconsideration - former commissioners' decisions	3	3	7	5	9	11	12	16	29	56
Extension of time to appeal	212	134	185	201	140	119	139	*	*	*
Preliminary matters	47	42	10	2	4	5	2	*	*	*
TOTAL	**2601**	**2077**	**2021**	**2032**	**1770**	**1970**	**1583**	**1527**	**1804**	**2005**

* Extension of time and other preliminary decisions were included in the number of decisions for each appeal matter type.

** In some instances these total figures differ slightly with the total number of decisions indicated in each year's annual report (variance of 0 for 2000 and 2001, and 1 for 1999, to a high variance of 14 for 1992). This may have been caused by the introduction and revision over time of the Division's computerized appeal tracking system.

(b) Appeals from Review Board findings

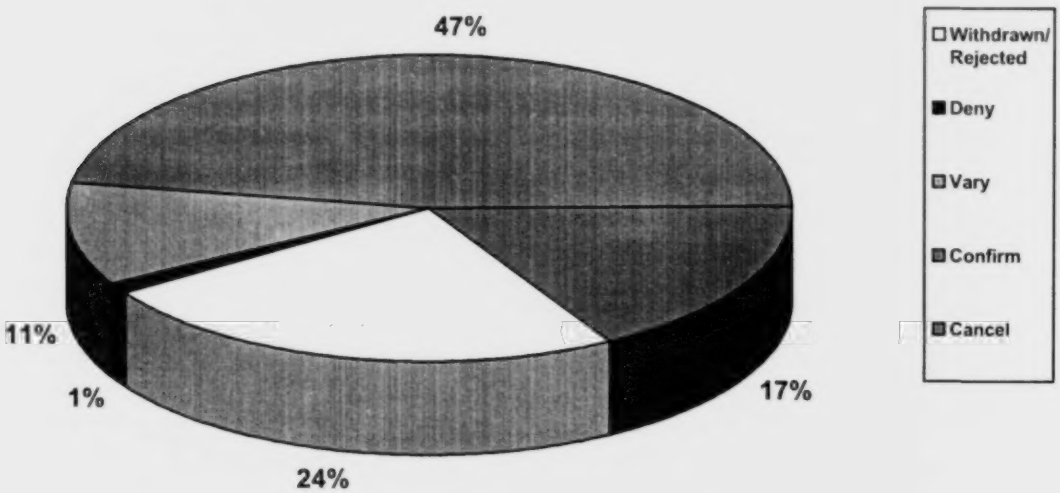


Disposition	*Number*	*Percentage*
Withdrawn/Rejected	277	15
Decisions (1609)		
Partial	249	13
Allow	389	20
Deny	958	51
Referred	13	1
Total	***1886***	***100***

Pending at the end of 2000	973
New applications in 2001	*1907
Total for consideration	2880
Total completions (withdrawals and decisions)	1886
Pending as of December 31, 2001	997

* Includes adjustment from 2000 annual report and three (3) appeals recommenced following reconsideration decisions voiding the original Appeal Division decisions.

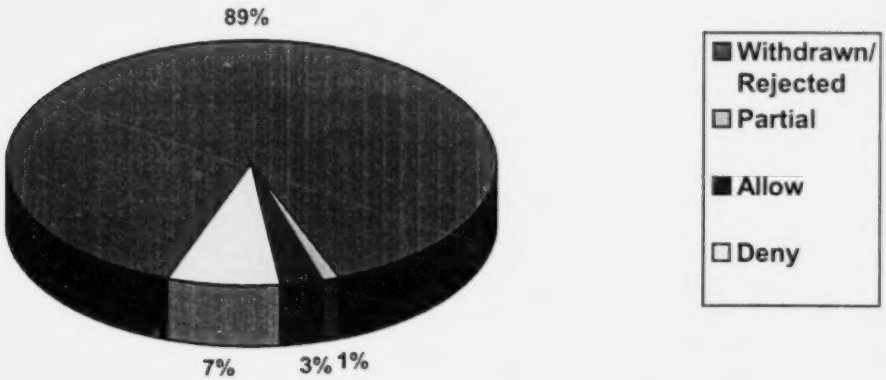
(c) Prevention (including Bill 14 matters)



Disposition	*Number*	*Percentage*
Withdrawn/Rejected	20	24
Decisions (63)		
Deny	1	1
Vary	9	11
Confirm	39	47
Cancel	14	17
Total	***83***	***100***

Pending at the end of 2000	48
New applications in 2001	96
Total for consideration	144
Total completions (withdrawals and decisions)	83
Pending as of December 31, 2001	60

(d) Relief of claim costs (under section 39, and for experience rating purposes under section 42)

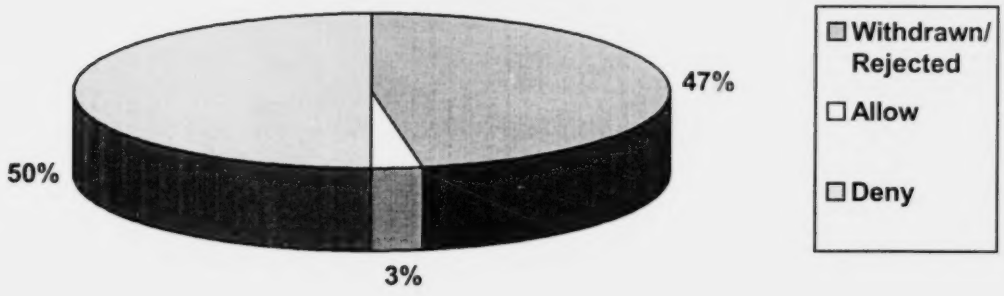


Disposition	*Number*	*Percentage*
Withdrawn/Rejected	3199	89
Decisions (408)		
Partial	40	1
Allow	97	3
Deny	270	7
Referred	1	0
Total	***3607***	***100***

Pending at the end of 2000	2347
New applications in 2001	* 1925
Total for consideration	4272
Total completions (withdrawals and decisions)	3607
Pending as of December 31, 2001	670

* Includes adjustment from 2000 annual report.

(e) Appeals by unregistered employer charged with claim costs under section 47(2)

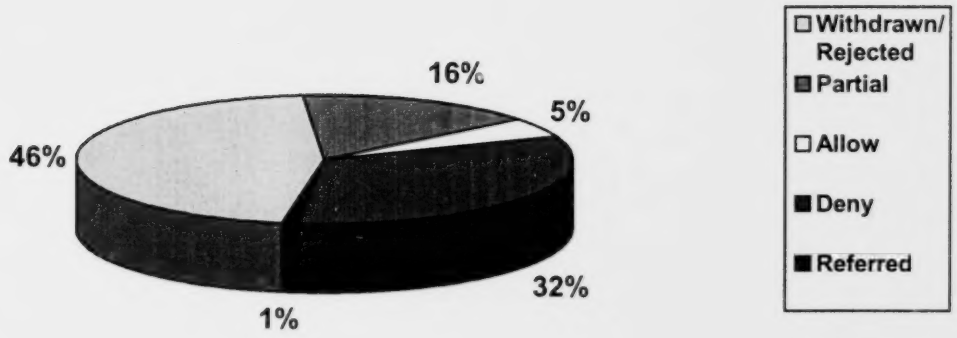


Disposition	*Number*	*Percentage*
Withdrawn/Rejected	17	47
Decisions (19)		
Allow	1	3
Deny	18	50
Total	***36***	***100***

Pending at the end of 2000	16
New applications in 2001	* 42
Total for consideration	58
Total completions (withdrawals and decisions)	36
Pending as of December 31, 2001	22

* Includes adjustment noted in 1999 annual report.

(f) Assessment appeals



Disposition	***Number***	***Percentage***
Withdrawn/Rejected	38	46
Decisions (45)		
Partial	13	16
Allow	4	5
Deny	27	32
Referred	1	1
Total	***83***	***100***

Pending at the end of 2000	47
New applications in 2001	62
Total for consideration	109
Total completions (withdrawals and decisions)	83
Pending as of December 31, 2001	26

(g) Transfer of claim costs – section 10(8)

The Appeal Division issued one decision during 2001 on appeals from Board officer decisions under section 10(8) of the Workers Compensation Act. That decision denied the appeal. The Appeal Division received one new appeal in 2001. There were two section 10(8) appeals pending before the Appeal Division at the end of 2001.

(h) Section 11 certificates for legal actions

The Appeal Division rendered 63 decisions during 2001 on applications under section 11 of the Workers Compensation Act for a certificate for filing in a legal action. Written reasons were provided by the Appeal Division for each decision rendered, together with a certificate for filing in the Supreme Court of British Columbia.

Pending at the end of 2000	141
New applications in 2001	100
Total for consideration	241
Total completions Withdrawals (45) Decisions (63)	108
Pending as of December 31, 2001	133

In 2000, the Appeal Division made 48 decisions on section 11 applications, 49 in 1999, 53 in 1998, 41 in 1997, 53 in 1996, 41 in 1995, and 39 in 1994.

(i) Criminal Injury Compensation Act

The Appeal Division issued 74 decisions in 2001 on review applications under the Criminal Injury Compensation Act. Written reasons were provided in each case. Leave was granted in 14 cases, denied in 24 cases and partially allowed in one case. Thirty-two decisions were made after a review on the merits, resulting in 16 applications allowed, 13 denied, and three partially allowed. In addition, three decisions were made on applications for

reconsideration of an Appeal Division decision under the Criminal Injury Compensation Act. The applications were denied in each case.

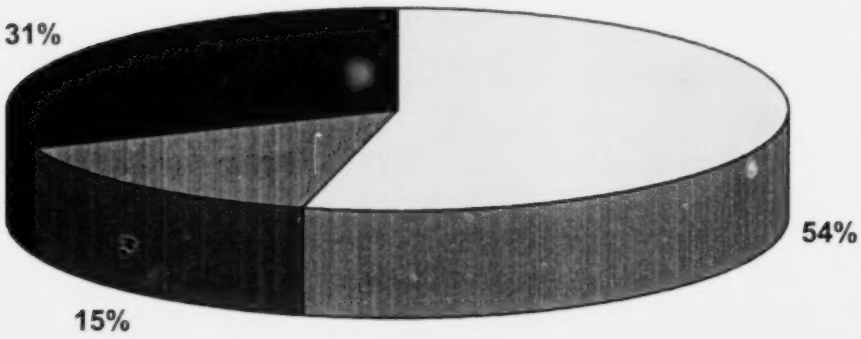
The Appeal Division issued 113 decisions in 2000 on review applications under the Criminal Injury Compensation Act, 97 decisions in 1999, 77 decisions in 1998, 51 decisions in 1997, 40 decisions in 1996, and 29 decisions in 1995.

(j) Preliminary dispositions

The Appeal Division issued written reasons on 259 preliminary matters in 2001. These 259 decisions on preliminary matters included 212 decisions on applications for extension of time to appeal, and 27 applications for a stay, and four related to appeal time limits, in relation to occupational health and safety penalties. A stay application was allowed in five of the 27 cases. One preliminary decision granted various subpoenas in relation to an occupational health and safety matter. Decisions were also issued on preliminary matters related to seven Review Board appeals, five Employer Relief of Costs appeals, two Section 96(4) referrals and one Section 11 determination.

The following chart represents the results on applications for an extension of time to appeal in 2001. As noted in the chart, there were 96 withdrawals of requests for an extension of time in 2001.

APPLICATIONS FOR AN EXTENSION OF TIME TO APPEAL: OUTCOMES IN 2001



	Allowed	166	54%
	Denied	46	15%
	Withdrawn	96	31%
	Total	**308**	**100%**

The 212 extension of time to appeal decisions are noted in the following table according to the type of matter to which the decision relates and outcomes of those decisions:

Type of Matter	***Allow***	***Deny***	***Total***
Section 91(1) appeals	84	27	**111**
Prevention	1	0	**1**
Employer relief of claim costs	69	19	**88**
Employer charged with costs	11	0	**11**
Assessments	1	0	**1**
Total	***166***	***46***	***212***

(k) Reconsideration applications

(i) General

Fifty-six reconsideration decisions were issued by the Appeal Division during 2001. Three concerned decisions of the former commissioners, and 53 concerned Appeal Division decisions.

DECISIONS RENDERED ON APPLICATIONS FOR RECONSIDERATION, BY YEAR

Year	*Former Commissioners' Decisions*	*Appeal Division Decisions*
1992	56	15
1993	29	29
1994	16	55
1995	12	49
1996	11	44
1997	9	48
1998	5	44
1999	7	38
2000	3	62
2001	3	53

(ii) Decisions of the former commissioners

The Appeal Division continues to have jurisdiction over decisions made by the former commissioners prior to 1991. A British Columbia Supreme Court decision in 2001 confirmed an Appeal Division decision which articulated temporal limits on such reconsiderations based on new evidence (Atchison v. Workers' Compensation Board (29 November 2001), 2001 BCSC 1661).

During 2001, three applications for reconsideration of decisions of the former commissioners were considered.

Two of these applications were made on behalf of workers. One application was made by an employer.

Two applications were made on the basis of new evidence. The preliminary requirements were not met in either case.

All three applications contained arguments that decisions of the former commissioners involved an error of law. None of these arguments were successful.

In total, no application for reconsideration of a former commissioners' decision was successful.

(iii) Appeal Division decisions

During 2001, 53 applications for reconsideration of Appeal Division decisions were considered. In addition, three decisions were made on the merits of the matters after grounds for reconsideration were earlier established.

Three applications were made on the basis of new evidence alleged not to be previously available, and 37 applications were made on the basis of common law grounds (primarily error of law going to jurisdiction, including a breach of the rules of natural justice). These common law grounds were described in Appeal Division decision #93-0740 (10 WCR 127) and approved in the British Columbia Supreme Court decision of Atchison v. Workers' Compensation Board (29 November 2001), 2001 BCSC 1661. Thirteen applications were made on the basis of both new evidence and common law grounds.

New evidence

Of the 16 applications for reconsideration of an Appeal Division decision on the basis of new evidence under section 96.1, none met the preliminary requirements for obtaining reconsideration on the basis of new evidence that was substantial, material and satisfied the required due diligence test.

Error of law going to jurisdiction

Six cases were allowed of the 50 applications for reconsideration invoking an allegation of error of law going to jurisdiction. The basis for the successful reconsideration applications are summarized below. The decisions can be viewed on the Board's website [http://www.worksafebc.com/appeal_decisions/appealsearch/advancesearch.asp] using the decision number provided as the search term.

(a) Breach of the rules of natural justice

- Appeal Division decision #2001-0631 (2 April 2001)

  A breach of procedural fairness occurred as a result of confused communication between counsel for the worker and the appeal officer regarding the deadline for submissions in relation to two appeals before the Appeal Division. In the unique circumstances of this case, and given the fundamental importance of the right to participate in an appeal, the Appeal Division decision was set aside.

- Appeal Division decision #2001-1497 (26 July 2001)

  A breach of natural justice occurred when an Appeal Division panel made a decision based on documents that were not disclosed to the employer participating in the appeal. While the employer received notice of these documents, this notice did not amount to disclosure in the sense of providing the employer with all the information it required in order to know the case it had to meet.

- Appeal Division decision #2001-1560 (8 August 2001)

  Whether the worker in this case had a permanent functional impairment was not an issue properly before the original Appeal Division panel for a decision. Even if it were an issue within the panel's jurisdiction, the parties would not reasonably have foreseen that the panel would render a decision on this issue

and did not have the opportunity to provide submissions on it. Accordingly, it would involve a breach of natural justice to make a decision on that issue.

(b) Not considering an issue

- Appeal Division decision #2001-1619 (16 August 2001)

  The original Appeal Division panel clearly identified the issue before it. The panel, however, failed to proceed with consideration of that issue. In neglecting to address an issue that was before it and within its jurisdiction, the original Appeal Division panel committed an error of law going to jurisdiction. The missed issue was remitted to an Appeal Division panel.

(c) Patently unreasonable handling of the evidence

- Appeal Division decision #2001-1901(27 September 2001)

  When some evidence existed on file suggesting disability, it is patently unreasonable for an Appeal Division panel to conclude that there is no evidence the worker has been disabled. This is a patently unreasonable finding of mixed fact and law because whether something is evidence is a point of law and whether something exists is a point of fact. The Appeal Division panel's determination concerning the existence of a disability was set aside as a nullity.

(d) Error related to whether Appeal Division panel had jurisdiction

- Appeal Division decision #2001-0779 (24 April 2001) [Upheld on judicial review (29 November 2001) 2001 BCSC 1661]

  The Appeal Division has no jurisdiction to reconsider decisions of the former commissioners dating back to 1956 and 1957 under the "new evidence" provisions of section 96.1 of the Workers Compensation Act.

(I) Section 96(4) referrals

Under section 96(4), the President has the authority, within 30 days of a finding of the Review Board, to refer the finding to the Appeal Division for redetermination on grounds of error of law or contravention of a published policy of the Governors.

In considering referrals by the President under section 96(4), the Appeal Division is fulfilling its responsibility under the Act to provide interpretive guidance to the workers' compensation system.

During 2001, the Appeal Division received four section 96(4) referrals of Review Board findings by the President. This compares to nine in 2000, six in 1999, four in 1998, three in 1997, and seven in both 1996 and 1995, two in 1994, and four in 1993. The Appeal Division rendered a decision on the merits of four referrals in 2001 (all of which were in relation to referrals made in 2000). In addition, two preliminary decisions were made in relation to a section 96(4) referral made in 2001. The decisions can be viewed on the Board's website [http://www.worksafebc.com/appeal_decisions/appealsearch/advancesearch.asp] using the decision number provided as the search term. A brief summary of each decision is provided below.

Four referrals remained before the Appeal Division at year-end.

- **Review Board jurisdiction over an issue**
  Appeal Division decision #2001-0130 (19 January 2001)

  The pension decision before the Review Board related only to the permanent impairment arising from the psychological consequences of a sexual assault. There was no issue before the Review Board panel about the permanent impairment related to the worker's multiple sclerosis. The Review Board panel acted without jurisdiction by making a finding on the worker's entitlement to a loss of earnings pension with regard to her multiple sclerosis.

- **Wage loss benefits and section 34**
  Appeal Division decision #2001-0897 (8 May 2001)

  The Appeal Division panel concluded items #34.40 and #34.41 of the Rehabilitation Services and Claim Manual were a lawful application of the discretion granted under section 34. Consequently, the worker was entitled to receive wage loss benefits for a statutory holiday and the employer was not eligible for reimbursement in respect of the payment it made to the worker for that day.

- **Section 55 and the date of disablement for occupational disease**
  Appeal Division decision #2001-1285/86 (28 June 2001)

  The date of the worker's medical disability was 1994. This was more than three years before the worker's application for compensation. The Review Board majority did not refer to section 55 but instead relied upon item #29.42 of the Rehabilitation Services and Claims Manual (*Meaning of disabled from silicosis*). The Appeal Division panel determined this provision did not affect the operation of section 55 in this case. Instead, that policy item deals with the medical date of disablement, not the effective date of a pension in the context of section 55. It is a contravention of policy to apply policy in item #29.42 as if there were no statutory limit for compensation applications.

- **Pension related to Raynaud's Phenomenon**
  Appeal Division decisions #2001-2111/2112 (26 October 2001)

  The worker was a millwright welder in 1997 when he applied for compensation related to Raynaud's Phenomenon in his left index finger. The board accepted his claim but determined he would not receive a pension.

  The Appeal Division panel concluded it was a contravention of governors' policy for the Review Board to rely upon a 1998 version of item #39.44 to allow the worker's appeal. Consequently, section 96(4) of the Act required the Appeal Division panel to redetermine the Review Board finding.

Since the validity of item #39.44 was raised as an issue in these proceedings the panel considered what standard of review was appropriate. The panel adopted the highest deferential standard of review, often used by courts in reviewing decisions of expert administrative tribunals. The standard adopted for reviewing the lawfulness of policy was whether the policy is a patently unreasonable interpretation of the statute.

The Appeal Division panel conducted an extensive review of Royal Commission reports, and documents of a former board vice-chair. The panel concluded the purpose of section 23(1) is clear and a worker does not require a loss of earnings in order to be entitled to a pension pursuant to that provision. That aspect of item #39.44 (1995), which precludes a pension where the worker had returned to his/her normal or equal paying occupation, was found to involve a patently unreasonable interpretation of section 23(1).

- **Policies regarding interim or provisional adjudication**
  Appeal Division decision #2001-2097 (24 October 2001)

The Appeal Division panel noted a seeming lack of coherence in the Board's policies concerning interim or provisional adjudication. In view of the possibility that a current item of policy (item #66.12 of the Rehabilitation Services and Claims Manual) was overlooked in 1992 policy amendments, and thus may not reflect the intent of those policy revisions, the panel suggested it may be appropriate to refer this matter to the Panel of Administrators for clarification of the policy before making a decision on the section 96(4) referral.

- **Policies regarding interim or provisional adjudication**
  Appeal Division decision #2001-2098 (24 October 2001)

Pursuant to item #5.0 of Governors' Decision #75 [*Appeal Division Administration, Practice and Procedure*, 10 WCR 753], the Chief Appeal Commissioner referred the policy issue identified in decision #2001-2097 to the Panel of Administrators for its consideration. The Appeal Division decision on the President's referral would be postponed until the policy issue is addressed by the Panel of Administrators.

8. POLICY MATTERS

The following eleven Appeal Division decisions were among the more significant decisions referred by the Chief Appeal Commissioner to the attention of the Panel of Administrators in 2001. The decisions are available on-line at [http://www.worksafebc.com/ca/appeal_decisions/appealsearch/advancesearch.asp] using the decision number provided as the search term.

- **Standard of review on appeals under subsections 96(6) and 96(6.1)**
  Appeal Division decision #2001-0105 (16 January 2001)

  Having regard to the Appeal Division's role of providing interpretative guidance to the workers' compensation system, deference need not be shown by the Appeal Division in evaluating a decision on appeal under subsection 96(6) or 96(6.1) for an error of fact or a contravention of law or policy. The panel stated it was not persuaded that the legislature intended a standard of review more deferential than correctness.

- **Occupational exposure to HIV/AIDS**
  Appeal Division decision #2001-0264 (6 February 2001)

  Although the Appeal Division's normal approach would be to apply the Board's published policy (in this case item #32.60 of the Rehabilitation Services and Claims Manual) and override a Board practice directive (regarding what constitutes a personal injury under the Act in the context of occupational exposure to HIV/AIDS) that contradicts policy, the panel decided it would not be appropriate to do so given the exceptional nature of this case. The panel also noted this case arose during a period when the Board's policy in this area may be in the process of development.

- **Obligation not to discourage worker from reporting to the Board**
  Appeal Division decision #2001-0416 (28 February 2001)

  Item #94.20 of the Rehabilitation Services and Claims Manual states, in part, that where there is any suggestion section 13(2) [offence of threats to discourage worker from reporting injury] has been violated,

the claim should be referred immediately to a director, Claims. Effective October 1, 1999, section 13(2) was repealed. Policy at #94.20 does not appear to have been amended, notwithstanding the repeal of section 13(2). Section 13(2) was replaced by section 177 in Part 3 of the Act, which is largely dealt with by the Board's Prevention Division. The Appeal Division panel pointed to the need for coordination between the Compensation Services Division and the Prevention Division to ensure that such issues are addressed under the current provisions of the Act.

- **Payment of interest on section 39(1)(e) matters**
  Appeal Division decision #2001- 0497 (9 March 2001)

  The panel found that the April 23, 1998 resolution of the Panel of Administrators (*Section 39(1)(e)*, 14 WCR 107), which supports paying interest from the date of the employer's request for relief (in this case 1997), is not applicable to requests for relief of costs filed with the Board prior to the resolution.

- **Subjective complaints**
  Appeal Division decision #2001-0916 (9 May 2001)

  Policy concerning pension awards for subjective complaints is set out in item #39.01 of the Rehabilitation Services and Claims Manual, as well as in Decisions Nos. 318 and 407 in the Workers' Compensation Reporter. The Appeal Division panel commented that the policy concerning subjective complaints is not entirely clear and appears capable of four differing interpretations. The panel applied one such interpretation. The panel commented that clarification of item #39.01 would assist in promoting consistency in the manner in which it is applied.

- **Principal of unregistered employer**
  Appeal Division decision #2001-1217 (19 June 2001)

  Relying upon Decision No. 335 (*Re Principals of Limited Companies* (1981), 5 WCR 101), the Board denied a party's claim for compensation benefits on the basis that he was the principal of a company that was not registered. In considering a request for a section 11 determination in a civil action, the Appeal Division panel

noted the considerable force of arguments pointing to seemingly different treatment of non-conforming principals, as compared to workers. Workers who fail to meet their obligations under the Act for timely reporting of claims to the employer and the Board may face the hardship of being denied compensation, but they remain subject to the section 10 bar to legal action. The Appeal Division panel concluded the policy set out in Decision No. 335 is viable under the Act, and found the party in this case was not a worker for the purposes of the legal action. Similar concerns were expressed in Appeal Division decision #00-0684 [reported at pages 39 and 40 of the Appeal Division 2000 annual report].

- **Payment of legal fees**
  Appeal Division decision #2001-1902 (27 September 2001)

  The Board policy not to pay legal costs may yield where there are "unique considerations" in a "truly deserving case". The test requiring "flagrant abuse" by a Board officer [see Appeal Division decision #93-1687, *Legal Fees* (1993), 10 WCR 211] is not definitive. In the present case, the totality of the circumstances warranted a departure from the policy.

- **Policies regarding interim or provisional adjudication**
  Appeal Division decisions #2001-2097/2098 (24 October 2001)

  See summary of these decisions in section 7(I) of this Annual Report (Section 96(4) referrals).

- **Students coverage under section 3(7)(a) of the Workers Compensation Act**
  Appeal Division decision #2001-2309 (21 November 2001

  In the course of making a section 11 determination regarding the status of a student in a career-planning course, the Appeal Division panel encountered a three-month delay in receiving information from the Board's Assessment Department regarding registrations under section 3(7)(a). The Appeal Division panel suggested the director of the Assessment Department consider whether the background documentation with respect to admissions under section 3 of the Act

could be made more readily accessible to Board staff and the public so as to assist in addressing issues arising under that section.

- **Notice of cancellation in Assessment Policy Manual**
  Appeal Division decision #2001-2434 (4 December 2001)

  The Board cancelled a roofing contractor's Personal Optional Protection shortly before the contractor suffered a serious head injury. Cancellation procedures set out in item #20:50:50 of the Assessment Policy Manual were not followed. The director of the Assessment Department indicated to the Appeal Division panel that the Department had changed its cancellation procedures approximately 10 years before and these practices were not consistent with published policy. The policy breach did not nullify the POP cancellation. The panel commented, however, that it is inappropriate to have published policy that does not reflect the true state of procedures in the Assessment Department. It is doubly inappropriate to have the discord between published policy and actual practice continue for ten years. The panel recommended that the Panel of Administrators amend item #20:50:50 to make it accurate.

9. PUBLICATION OF APPEAL DIVISION DECISIONS

Twenty-two Appeal Division decisions issued in 2001 were forwarded for publication in the Workers' Compensation Reporter. In addition, two decisions from 1999, and nine from 2000, were forwarded for publication during 2001. In total, thirty-three decisions were sent for publication.

Over the past nine years, 366 Appeal Division decisions have been published in the Reporter (to volume 17, no. 4). Appeal Division decisions published in the Reporter are also available on-line at:

http://www.worksafebc.com/publications/appeals/wc_reporter/default.asp

In addition, all Appeal Division decisions issued since January 1, 2000 are available on-line at:

http://www.worksafebc.com/appeal_decisions/appealsearch/advancesearch.asp

The following are brief comments concerning the decisions forwarded for publication in the Workers' Compensation Reporter during 2001. These comments are intended to be descriptive only, to assist in locating relevant decisions.

- **Psychological injury – arising out of and in the course of employment**
  #99-1254, 17 WCR 117, 20 August 1999

  The worker was seeking compensation for stress caused by sexual harassment at work. The Review Board found that the worker had not suffered an injury arising out of employment. The Appeal Division panel formulated a three-part test for determining whether a worker has suffered a compensable psychological injury under section 5 of the Act, and allowed the worker's appeal.

- **Major depressive episode - psychological injury – arising out of and in the course of employment**
  #2000-0073, 17 WCR 129, 18 January 2000

  Applying the 3-part test [see Decision #99-1254] for psychological injury, the Appeal Division panel found that the alleged harassment of the worker by the employer was not substantiated. It followed that the workplace circumstances or events did not involve unusual stimuli. Given this conclusion, it was unnecessary to proceed to the second and third steps of the test.

- **Status of principals of unregistered companies (No. 1)**
  #2000-0684, 17 WCR 475, 11 May 2000

  The majority of the Appeal Division panel interpreted Decision No. 335 as affecting the status of a principal of an unregistered company under sections 10 and 11. As a result, the plaintiff was found not to be a worker. The dissenting panel member was reluctant to pierce the corporate veil except where specifically provided for in policy.

- **Repeat fall protection penalty**
  #99-0441, 17 WCR 193, 9 March 1999

  The employer's penalty for violation of fall protection regulations was reduced by $2,700. The Appeal Division panel dismissed the argument that the employer was denied a fair hearing in the order review process and concluded that the sanction review officer had the jurisdiction to consider the validity of an order issued under section 73 of the Act.

- **Reconsideration – repeat fall protection penalty**
  #2000-1143, 17 WCR 215, 27 July 2000

  The employer's application for reconsideration of Appeal Division Decision #99-0441 was denied. The only grounds for reconsideration on non-claims matters are common law grounds including clerical mistakes, fraud, or an error of law going to jurisdiction. In this case there was no patently unreasonable error of law.

- **Section 91(2) – standing of deceased worker's estate to carry on appeal**
  #2000-1241, 17 WCR 235, 14 August 2000

  Pursuant to section 91(2), the Appeal Division panel directed that the Review Board reconsider its decision that the estate of the deceased worker did not have standing to proceed with an appeal. The Review Board had declined to follow a previous "leading" Review Board decision [14 WCR 375] that an estate has standing.

- **Occupational health and safety – provincial jurisdiction – federally regulated undertaking**
  #2000-1650, 17 WCR 239, 18 October 2000

  The Appeal Division panel concluded that the Board had jurisdiction over the occupational health and safety of workers constructing living units for a federally regulated railway company on property owned and/or operated by the company. The construction activities of the employer were not an integral part of the federal undertaking and therefore the provincial Act and Regulations applied. The administrative penalty imposed under section 196(6) was upheld.

- **Psychological injury - workplace stress**
  #2000-1682, 17 WCR 147, 26 October 2000

  Feelings of anger, frustration, distress, or anxiety stemming from workplace events are not sufficient to establish a basis for compensation. In the absence of a diagnosis of a mental disorder or evidence to substantiate that the worker was psychologically impaired, the Appeal Division panel was unable to conclude that the worker suffered a personal injury arising out of and in the course of her employment.

- **Allergic reactivity to chromate and thiuram – occupational disease**
  #2000-1770, 17 WCR 153, 9 November 2000

  The Appeal Division panel expressed concerns that the policies contained in Items #29.20 and #30.50 of the Rehabilitation Services and Claims Manual may not accord with a viable interpretation of section 23 of the Act. These policies effectively preclude a disability pension where the disability results from an allergy that is asymptomatic except with exposure. No determination was reached on the issue of lawfulness as the polices were not directly applicable to the appeal. Under section 6(4), the panel designated the worker's allergic reactivity to chromate and thiuram as an occupational disease and directed the Board to assess the worker's pension entitlement under subsections 23(1) and (3).

- ***Criminal Injury Compensation Act*** **– use of polygraph evidence**
  #2000-1857, 17 WCR 513, 22 November 2000

  The Appeal Division panel preferred the direct evidence of the victim that she had been sexually abused over the claim of the alleged offender that he had passed a polygraph test, the results of which were no longer on the police record. Polygraph tests are considered to be unreliable evidence about whether a criminal act has occurred.

- **Appealable issue**
  #2000-2001, 17 WCR 317, 14 December 2000

  The employer's appeal, initiated by way of a form letter requesting a decision relative to all claim costs charged to the employer, was denied as premature and not raising an appealable issue.

- **Relief of costs – standard of review**
  #2001-0105, 17 WCR 323, 16 January 2001

  See summary of this decision in section 8 of this Annual Report (Policy Matters).

- **Occupational health and safety – sloping violation – presumption of high risk of injury – due diligence**
  #2001-0295, 17 WCR 257, 13 February 2001

  The Appeal Division panel applied a systematic approach to a review of an administrative penalty levied under section 196 of the Act. The evidence established on a balance of probabilities a violation of the Occupational Health and Safety Regulation regarding the sloping of excavation sides. However, the employer successfully rebutted the presumption that this violation gave rise to a high risk of injury. In light of the employer's due diligence and compliance history, a warning letter was deemed sufficient, and the penalty was cancelled.

- **Occupational health and safety – fall protection violation – departure from recommended schedule of sanctions**
  #2001-0339, 17 WCR 273, 19 February 2001

  Where the circumstances warrant, it is open to the reviewing officer to depart from the recommended schedule of sanctions outlined in Prevention Division policy #1.4.1 (for violations occurring before May 1, 2000) or the new penalty guidelines passed by the Panel of Administrators (for violations occurring on or after May 1, 2000).

- **Reimbursement – expenses for attending a Review Board hearing**
  #2000-0848A, 17 WCR 503, 19 February 2001

  In a supplement to an Appeal Division decision allowing the worker's appeal, the Appeal Division panel concluded that the Appeal Division may provide reimbursement for the expense of attending a Review Board hearing.

- **Occupational health and safety – notification to parties – posting requirements – fall protection**
  #2001-0438, 17 WCR 285, 28 February 2001

  This was an appeal of a decision of the reviewing officer imposing a penalty under section 196(6) for violation of fall protection requirements. The Appeal Division panel allowed the appeal to proceed notwithstanding irregularities concerning notice of the appeal application. In the result, the employer's appeal was denied.

- **Hernia – arising out of and in the course of employment – exception to Board policy**
  #2001-0417, 17 WCR 343, 28 February 2001

  Workplace incident was an "unusual circumstance" warranting a departure from Board policy that umbilical herniae are not compensable.

- **Occupational health and safety appeals – extension of time to appeal**
  #2001-0502, 17 WCR 295, 12 March 2001

  Unlike Part 1 of the Act which allows for an extension of time to appeal (section 96(6)), Part 3 does not contain any provision authorizing the Appeal Division to extend the time for filing an appeal on health and safety matters. The Appeal Division has no jurisdiction to consider an appeal of an administrative penalty that is filed beyond the 30-day statutory time period.

- **Occupational health and safety appeals – request for stay (No. 1)**
  #2001-0503, 17 WCR 297, 12 March 2001

  The primary issue on a stay application is whether it would be just and equitable to issue a stay given the relative risk of harm to the parties if a stay is granted. The Appeal Division panel, in granting the stay, took into account: the fact that no other workers were affected by the alleged violation; the precarious financial situation

of the applicants; the quantum of the administrative penalty appealed; and a determination that the appeal was not frivolous.

- **Occupational health and safety appeals – request for stay (No. 2)**
  #2001-0535, 17 WCR 301, 16 March 2001

  A stay is an extraordinary remedy and will only be granted where the employer has established sufficient grounds to satisfy the criteria set out in Appeal Division Decision #27 [now see Appendix "D" of Decision #33, 17 WCR]. The Appeal Division panel found that payment of the administrative penalty would not cause the employer irreparable harm and denied the employer's request for a stay.

- **Psychological injury – workplace stress – medical evidence**
  #2001-0574, 17 WCR 347, 26 March 2001

  Adopting the approach developed in previous decisions to determine whether a worker has suffered a traumatically induced psychological impairment, the Appeal Division panel concluded that the medical evidence in this case was insufficient to support a finding of psychological impairment, and denied the worker's appeal.

- **Relief of costs**
  #2001-0635, 17 WCR 359, 3 April 2001

  The Appeal Division panel held that the Board officer, in considering a request for relief of costs, was not bound by a prior Appeal Division decision on the termination of the worker's wage loss benefits.

- **Worsening of medical condition – arising out of and in the course of employment**
  #2001-0756, 17 WCR 373, 20 April 2001

  The Appeal Division panel found that the deterioration of the worker's medical condition resulted from personal causes, and to this extent his work activity had no causal significance. The

aggravation of the underlying diabetes was not compensable in the circumstances.

- **Section 96(4) referral – payment of wage loss benefits for a statutory holiday**
  #2001-0897, 17 WCR 519, 8 May 2001

  See summary of this decision in section 7(l) of this Annual Report (Section 96(4) Referrals).

- **Implementation of Medical Review Panel certificate –subjective complaints**
  #2001-0916, 17 WCR 533, 9 May 2001

  See summary of this decision in section 8 of this Annual Report (Policy Matters).

- **Procedural fairness – bias**
  #2001-0934/0935, 17 WCR 383, 11 May 2001

  The Appeal Division panel applied the five-part test set out in the Supreme Court of Canada decision, *Baker* v. *Minister of Citizenship and Immigration*, [1999] 2 S.C.R. 819, and concluded that the overall circumstances surrounding the re-classification and the imposition of the administrative penalty suggested a lack of impartiality on the part of the Board. A reasonable apprehension of bias arose from the conduct of the occupational safety officer, the hearing officer, and the assessment officer.

- **Retroactive rehabilitation benefits – interest**
  #2001-0972, 17 WCR 547, 16 May 2001

  There is no statutory entitlement to interest on retroactive benefits except in limited situations expressly addressed in the Act. The Board's interest payment policy covers wage loss and pension benefits, but excludes rehabilitation benefits. Any change in the circumstances under which interest is payable would require a statutory or policy change.

- **Status of principals of unregistered companies (No. 2)**
  #2001-1217, 17 WCR 559, 19 June 2001

  See summary of this decision in section 8 of this Annual Report (Policy Matters).

- **Section 96(4) referral – effective date of pension**
  #2001-1285/1286, 17 WCR 583, 28 June 2001

  See summary of this decision in section 7(l) of this Annual Report (Section 96(4) Referrals).

- **Decision 33 – Appeal Division practice and procedure decision**
  17 WCR, 29 June 2001 (effective 1 September 2001)

  See summary of this decision in section 5 of this Annual Report (Practice and Procedure).

- **Relief of costs – extension of time to appeal**
  #2001-1414, 17 WCR 435, 18 July 2001

  Despite a specific request from the employer's representative, a decision letter denying relief of costs was provided to the employer with no copy to the representative. The Appeal Division panel granted the application for an extension of time to appeal. While the employer bears some responsibility to preserve its appeal rights by communicating with its representative, this does not negate the unfairness flowing from the failure to provide the representative a copy of the decision.

- **Adequacy of reasons**
  #2001-1794, 17 WCR 453, 14 September 2001

  When appropriate, writing shorter decisions may assist in obtaining clarity in decision-making and in ensuring that valuable resources can be assigned to more complex appeals.

- **Payment of legal fees**
  #2001-1902, 17 WCR 595, 27 September 2001

  See summary of this decision in section 8 of this Annual Report (Policy Matters).

10. MATTERS PENDING BEFORE THE APPEAL DIVISION

The table below indicates the matters pending at the end of 2001 as compared to the matters pending at the end of each previous year in the Appeal Division's history. There was a significant 44% decline in the number of outstanding matters before the Appeal Division in 2001. This decrease is primarily due to the significant efforts and resources devoted in late 2000 and early 2001 to a more timely processing of employer relief of claim cost appeals under section 39(1)(e). There was a 72% drop in the number of such matters before the Appeal Division at year end 2001 compared to the end of 2000. This also takes account of the 22% decline in the number of such appeals filed with the Appeal Division in 2001 compared to 2000.

MATTERS PENDING AT DECEMBER 31 OF EACH YEAR

Matter Type	*2001*	*2000*	*1999*	*1998*	*1997*	*1996*	*1995*	*1994*	*1993*	*1992*
Section 91 appeals from Review Board	997	973	953	902	821	644	627	387	426	490
Section 96(4) President's referrals	4	6	3	3	1	1	3	1	2	0
Prevention – general	4	1	17	59	35	51	39	49	38	72
O.H.S. (Bill 14)	56	47	16	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Section 39(1) employer relief of costs	670	2347	2590	1307	462	421	30	26	39	30
Criminal injury matters	32	49	70	94	69	35	18	9	4	6
Section 47(2) employer charged with costs	22	16	20	13	8	15	7	5	5	9
Assessments	26	47	37	28	23	22	140	24	27	16
Section 10(8) transfer of claim costs	2	?	1	10	0	4	5	5	4	2
Section 11 certificates	133	141	126	86	81	65	56	66	56	47
Reconsideration - Appeal Division decisions	37	46	45	37	52	54	46	56	44	39
Reconsideration - former commissioners' decisions	0	2	3	7	6	8	16	7	6	10
Extension of time to appeal	143	111	88	104	97	70	27	*	*	5
Other matters	0	0	0	0	0	0	0	0	0	6
TOTAL	**2126**	**3788**	**3969**	**2650**	**1655**	**1390**	**1014**	**635**	**651**	**732**

*Extension of time to appeal matters were not separately tracked in matters pending in 1993 and 1994.

11. ORAL HEARINGS

The Appeal Division held 108 oral hearings during 2001. Sixty-six were heard by non-representational appeal commissioners sitting alone. Forty-two were heard by panels of three appeal commissioners.

The total number of decisions issued in 2001 was 2601; oral hearings were held in approximately 4.2% of cases. This represents a decrease from the figures of 7.7% in 2000, 7.6% in 1999, 7% in 1998 and 7.4 % in 1997. The Appeal Division held oral hearings in 8% of cases in 1996, 7.4%, in 1995, 9% in 1994 and 10% in both 1993 and 1992.

Of the 108 oral hearings during 2001, 89 concerned claims issues, 14 related to employer prevention penalty appeals, and five related to employer assessment appeals.

Sixty-eight (63%) of the oral hearings were held at the Richmond offices of the Board. Forty (37%) were held in locations around the province outside the lower mainland. These hearings were held in the following locations: Campbell River (2), Courtenay (3), Cranbrook (1), Kamloops (11), Kelowna (7), Nanaimo (8), Prince George (2), Quesnel (1), Sidney (1), Vernon (1) and Victoria (3).

The following table provides information regarding the number of oral hearings held outside the Lower Mainland since 1992:

Year	Total oral hearings	Hearings held outside the Lower Mainland	
		Number	As a % of total oral hearings
2001	108	40	37%
2000	159	53	33%
1999	154	58	38%
1998	143	50	35%
1997	130	44	34%
1996	158	45	28%
1995	118	28	24%
1994	140	34	24%
1993	184	49	27%
1992	202	24	12%

In 2001 interpreters were utilized in 11 oral hearings, in the following languages: Punjabi (4), Portuguese (2), Hindi (1), Cantonese (1), Mandarin (1), Slovak (1) and Spanish (1). Interpreters were used in 16 hearings in 2000, 9 hearings in 1999, 9 hearings in 1998, 6 hearings in 1997, 14 hearings in 1996, 10 hearings in 1995, and 16 hearings in 1994.

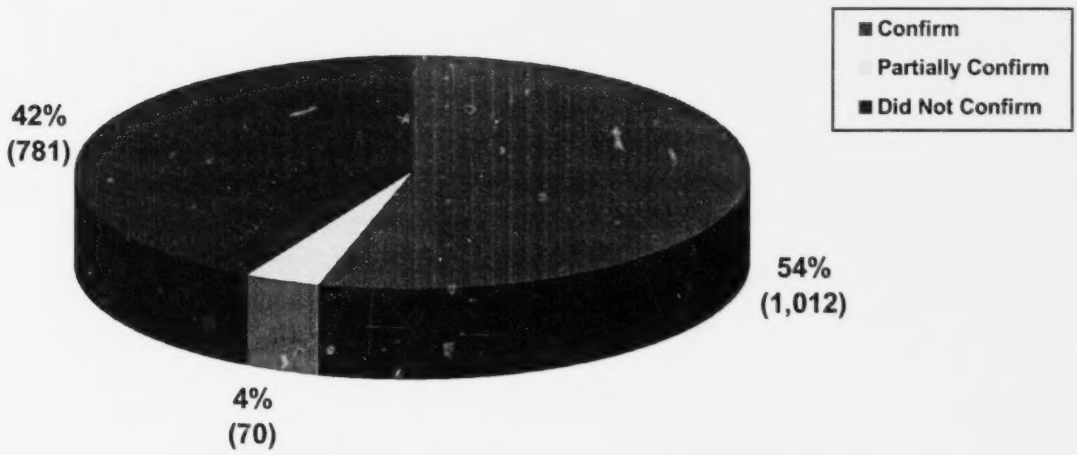
12. MEDICAL REVIEW PANEL APPEALS

As of January 17, 2002, 1,911 Medical Review Panel certificates had been issued on appeals from Appeal Division decisions since June, 1991. This is 180 more certificates than had been issued as of February 6, 2001. As of January 17, 2002, there are a further 206 appeals proceeding to Medical Review Panels from Appeal Division decisions.

There were 13,710 Appeal Division decisions issued between June 1991 and December 2001 on section 91 appeals from Review Board findings. The 2,117 Appeal Division decisions which have proceeded, or are proceeding, to a Medical Review Panel represents approximately 15% of decisions on section 91 appeals over the past ten years.

Of the 1,911 completed Medical Review Panel appeals, 48 await implementation by the Board's Compensation Services Division. Until that occurs we cannot state whether the Appeal Division decisions in those cases have been confirmed, partially confirmed, or not confirmed. However, 1,863 Medical Review Panel certificates have been implemented with the following results. The Appeal Division decision was confirmed in 1,012 cases (54%), partially confirmed in 70 cases (4%), and not confirmed in 781 cases (42%).

MEDICAL REVIEW PANEL APPEALS FROM APPEAL DIVISION DECISIONS: JUNE 1991 TO 2001



13. JUDICIAL REVIEW

Six decisions were issued by courts in 2001 on judicial review petitions arising from Appeal Division decisions.

The Supreme Court of British Columbia dismissed three petitions.

The British Columbia Court of Appeal upheld a British Columbia Supreme Court decision which had dismissed a petition for judicial review.

The Supreme Court of Canada denied leave for further appeal in two cases involving judicial review of Appeal Division decisions.

From the inception of the Appeal Division in 1991 to the end of 2001, decisions from the courts have been rendered in relation to 27 Appeal Division decisions. The Appeal Division decision has, in these cases, been ultimately upheld by the courts.

The following are summaries of the six court decisions in 2001 in relation to petitions for review of Appeal Division decisions.

(1) Greyhound Canada Transportation Corp. v. Workers' Compensation Board et al.
(15 March 2001) SCC #28097 (Supreme Court of Canada)
(Section 11 determination – fishers)

The Supreme Court of Canada denied Greyhound Canada's application for leave to appeal from the 1 June 2000 British Columbia Court of Appeal decision which upheld the Appeal Division section 11 determination (Appeal Division decision #99-0354/55, 26 February 1999). The Court of Appeal had dismissed an appeal from the British Columbia Supreme Court decision (9 September 1999) which also upheld the Appeal Division determination. The earlier court decisions were reported in the Appeal Division's Annual Reports for 1999 and 2000.

(2) Van Unen v. Workers' Compensation Board et al.
(6 April 2001) 2001 BCCA 262 (B.C. Court of Appeal)
(Oral hearing and legal fees)

The British Columbia Court of Appeal dismissed the worker's appeal from an August 5, 1999 decision of the British Columbia Supreme Court which had dismissed a petition for judicial review of a number of Appeal Division decisions.

Regarding the Appeal Division's decision to deny payment of legal fees to the worker, the court referenced item #100.40 of the Rehabilitation Services and Claims Manual which indicates, among other things, that "no expenses are payable to or for any advocate . . . [n]or does the Board pay fees for legal advice or advocacy in connection with a claim for compensation." The court confirmed the Appeal Division's approach to legal costs as being generally only warranted in unusual and extraordinary circumstances.

The court commented on the Appeal Division approach by stating:

> In my opinion, it leaves an ample discretion for truly deserving cases without violating the harmony of a system that the Board has decided should be conducted without any customary liability of the Board to pay legal fees from the accident fund to every successful claimant who retains a lawyer.

Regarding the Appeal Division's decision not to conduct an oral hearing in this case of an appeal from Review Board findings, the court confirmed the Appeal Division's approach and dismissed the appeal on this point as well. The court stated as follows:

> Section 90 of the *Workers' Compensation Act* deals with appeals from an officer of the Workers' Compensation Board to the Review Board. Section 91 deals with appeals from the Review Board to the Appeal Division. There is nothing in section 91 to indicate that what is contemplated is something other than a true appeal. A hearing *de novo* is not specifically required by the statute. In the absence of

> such a requirement, and in circumstances where oral evidence is given before the Review Board, and in circumstances where it is possible for a member of the Appeal Division to review that evidence, and in circumstances where the Review Board made findings of fact on the very issue raised by the worker, it is my opinion that it is not a breach of natural justice for the findings of fact based on credibility, veracity of testimony, and expert opinion, to be assessed by the Appeal Division without the requirement of an oral hearing.

The court added that the legislature did not intend that the function of the Appeal Division is to repeat precisely the work of the Review Board. The Appeal Division, the court stated, may choose to hear oral evidence if it seems to it to be right and fair to do so.

The Supreme Court of Canada, on October 4, 2001, dismissed the worker's application for leave to appeal from the April 6, 2001 decision of the British Columbia Court of Appeal.

(3) Mayden v. Workers' Compensation Board et al.
(17 May 2001) 2001 BCSC 725 (B.C.S.C.)
(Extension of time to appeal)

The worker filed a petition in British Columbia Supreme Court for judicial review of, among other things, an Appeal Division reconsideration decision (#2000-1319). In that decision the Appeal Division panel denied the worker's request for reconsideration of an Appeal Division decision (#99-0009) denying his request for an extension of time to appeal from a 1993 Review Board finding. The court concluded the petition should be struck out on the basis of a court rule providing such a remedy when, for instance, a petition discloses no reasonable claim, or is unnecessary, scandalous, frivolous or vexatious. The court determined the petition could not proceed since it was certain to fail. The worker initiated an appeal to the British Columbia Court of Appeal but his application for indigent status under court rules was denied at a Court of Appeal Chambers hearing on August 28, 2001.

(4) Atchison v. Workers' Compensation Board
(29 November 2001) 2001 BCSC 1661 (B.C.S.C.)
(Reconsideration related to a decision of the former commissioners)
Appeal Division decision #2001-0779

The British Columbia Supreme Court dismissed a petition for judicial review of an April 24, 2001 Appeal Division decision (#2001-0779). In that decision the Appeal Division panel set aside a 1999 Appeal Division decision which had concluded grounds existed on the basis of new evidence for reconsideration of former commissioner decisions from 1956 and 1957. In those decisions, the former commissioners concluded the death of the widow's husband was not compensable.

The Appeal Division decision under review concluded the "new evidence" ground for reconsideration in section 96.1 was not available in relation to former commissioner decisions from those dates. The matter was remitted to a new Appeal Division panel to determine whether other grounds for reconsideration were available, and to address the standing of the estate to request reconsideration.

The court concluded the Appeal Division panel was correct in concluding section 96.1 was not an available basis for reconsideration of former commissioner decisions from 1956 and 1957. The court also confirmed the Appeal Division's common law authority to reconsider its own past decisions on the basis of jurisdictional error.

(5) Hansen v. Workers' Compensation Board
(14 December 2001) Vancouver L012106 (B.C.S.C.)
(Reimbursement of travel and medical costs related to treatment in the United States of America)

The British Columbia Supreme Court dismissed a petition regarding a December 30, 1997 Appeal Division decision (#97-1767). In that decision the Appeal Division panel upheld a Board decision to pay for surgery performed in the United States only to the level of the equivalent cost of similar treatments in British Columbia. The court found the Appeal Division decision had a basis in law and in the evidence and was not patently unreasonable.

(6) Yee v. Workers' Compensation Board

Petition related to Appeal Division decision #99-1337 (8 September 1999)

(Pension on projected loss of earnings basis)

The 2000 Appeal Division annual report noted the July 14, 2000 decision of the British Columbia Supreme Court dismissing a petition for judicial review involving Appeal Division decision #99-1337. The Appeal Division decision related to a determination that the worker was not entitled to a pension on a projected loss of earnings basis. The petitioner had filed an appeal to the British Columbia Court of Appeal but this appeal was abandoned in 2001.